But the vendor's right to regain possession is subject to the carrier's lien for charges due upon the particular goods in question.[17]

The principles thus briefly stated speak only of the rights of the vendor. But is there any obligation resting upon him? That was the novel question involved in the recent case of *Booth Steamship Co. Lim.* v. *Cargo Fleet Iron Co. Lim.* (Ct. of App. 1916) 115 L. T. R. 199. In that case the defendant had sold goods which were delivered f. o. b. Liverpool for shipment to Brazil. The contract of affreightment was made between the plaintiff and the vendee. The defendant vendor, learning of the insolvency of the vendee, gave notice to the plaintiff to stop the goods in transit. The plaintiff obeyed and held the goods for the defendant; but he, for reasons of his own, refused to give any directions as to the disposition of the goods. The plaintiff sued him for damages, on the ground that the defendant was under an obligation to take the goods and discharge the carrier's lien. The court gave judgment for the plaintiff.

From a reading of the opinions rendered by the judges in the case, it is evident that they had difficulty in finding any legal principle on which to rest the liability of the defendant. Their reasoning seems to be this: under the old rule, the vendor could not assert a right to stop the goods in transit, unless he regained actual physical possession of them.[18] To do this he would of course be compelled to discharge the carrier's lien. The relaxation of the rule which permits the vendor to exercise his right of stoppage *in transitu* merely by giving notice to the carrier was not intended to put him in any better position. Exercising the right is merely a way of regaining possession; hence the vendor is under an obligation to take the goods and pay the carrier's lien. This reasoning is hardly to be commended. A common law lien, such as that which the carrier has, gives no right to bring an action to enforce it, but merely a right to retain possession until the carrier's proper demands are satisfied.[19] The defendant cannot be held for breach of contract, for the contract of affreightment was made with the vendee. Nor does there appear to be any other legal principle upon which the defendant ought to be held. It seems, therefore, that the obligation arising upon the exercise of the right of stoppage *in transitu* is just as anomalous as is the right itself. The case of *Booth Steamship Co. Lim.* v. *Cargo Fleet Iron Co. Lim. supra* is the first to recognize and enforce such an obligation. The result there reached is entirely justifiable, however; for the law gives to the unpaid vendor a valuable right, and it is reasonable to impose upon him a corresponding obligation.

LEVY ON INTEREST OF VENDOR IN EXECUTORY CONTRACT FOR SALE OF LAND.—In the recent case of *Reid* v. *Gorman* (S. D. 1916) 158 N. W. 780, a vendor had contracted to sell land to a vendee, who had paid part of the purchase price, but was in default and had abandoned the

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[17] See U. S. Steel Products Co. *v.* Great Western Ry., *supra*; Rucker *v.* Donovan (1874) 13 Kan. 251.

[18] See note 11, *supra.*

[19] 1 Jones, Liens (3rd ed.) § 1033. A remedy is often given by statute, but those statutes simply permit a sale of the property in the carrier's hands, under certain limitations, in order to satisfy the demands of the carrier. *Ibid.* § 1049 *et seq.*

land. The defendant then brought an action against the vendor, and issued an attachment on the land. The action was prosecuted to judgment, and the defendant claimed the right to redeem from the plaintiff, the assignee of the certificate of sale on foreclosure of a mortgage on the land, who was suing to obtain his sheriff's deed and quiet his title. It was held that the defendant might redeem, as the vendor's interest was subject to the lien of a judgment, and consequently, to levy and sale under attachment or execution. Whether this case is to be supported depends primarily upon a determination of the precise interest of the vendor in the land, after he has sold it to the vendee, but before the deed is delivered. Probably the best statement of the vendor's position is that he holds the legal title as security for the payment of the purchase money and subject to an equitable obligation to convey to the vendee whenever the latter shall become entitled to a conveyance;[1] and this seems to be the view of most of the courts, even when they call the vendor a trustee.[2]

It would seem, then, that where the vendee has not paid all of the purchase money there is a sufficiently substantial interest in the vendor to be subject to the lien of a judgment, or to attachment or sale on execution, after the making of the contract but before the delivery of the deed. For the lien of a judgment, or the title acquired at execution sale, where there is notice of the vendee's interest, covers the precise rights and obligations of the vendor; viz., the right to hold legal title to the land as security for the payment of the purchase price by the vendee, and subject to the vendee's equitable rights.[3] The vendee still has a right to a conveyance of the land upon payment of the unpaid purchase money to the judgment creditor or execution purchaser.[4] But as it would be manifestly unjust to compel the vendee to watch the records for entries of judgments or execution sales against his vendor, it is held in most jurisdictions that the vendee is entitled to the benefit of all payments made to his vendor prior to actual notice of the judgment lien or sale on execution;[5] the mere docketing of a judgment, or the mere fact of an execution is not notice to the vendee.[6] But if, after actual notice, the vendee pays anything to his vendor, he will be compelled to repay it to the judgment creditor or execution purchaser.[7] On the other hand, since a purchaser on execution is generally considered a *bona fide* purchaser, he is not subject

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[1]See 13 Columbia Law. Rev. 369, 372; *cf.* May *v.* Emerson (1908) 52 Ore. 262, 96 Pac. 454, 1065.

[2]Moyer *v.* Hinman (1855) 13 N. Y. 180; Coggshall *v.* Marine Bank Co. (1900) 63 Oh. St. 88, 57 N. E. 1086; First Nat'l. Bank *v.* Edgar (1902) 65 Neb. 340, 91 N. W. 404.

[3]Coggshall *v.* Marine Bank Co., *supra;* see May *v.* Emerson, *supra;* Filley *v.* Duncan (1871) 1 Neb. 134.

[4]Coggshall *v.* Marine Bank Co., *supra*; Simpson *v.* Niles (1848) 1 Ind. 196; *cf.* Lane *v.* Ludlow (C. C. 1840) 14 Fed. Cas. No. 8052. If the vendee abandons his contract with the vendor, the judgment lien attaches to the vendor's entire fee. See Filley *v.* Duncan, *supra.* This in fact happpened in the principal case.

[5]Moyer *v.* Hinman, *supra;* Filley *v.* Duncan, *supra; cf.* Burke *v.* Johnson (1887) 37 Kan. 337, 15 Pac. 204.

[6]Moyer *v.* Hinman, *supra; cf.* Burke *v.* Johnson, *supra.*

[7]Simpson *v.* Niles, *supra;* see May *v.* Emerson, *supra.*

to the vendee's equitable rights if he takes without notice.[8] But mere possession of the land by the vendee is constructive notice to him.[9]

The decision in *Reid* v. *Gorman, supra,* thus appears entirely sound. And it does not militate against this conclusion that the interest of a vendor is not subject to the lien of a judgment, or to attachment or execution, where he has only a bare legal title, and no beneficial interest in the property;[10] as, for instance, where the full purchase price has already been paid,[11] or where the vendor has assigned the vendee's notes for the balance,[12] or where the vendor is a mere conduit through which title passes,[13] since his interest is at best valueless. In some states, however, it is held that even where a portion of the purchase price is unpaid, a judgment creditor or execution purchaser acquires no rights in the land, since the vendor is said to have even here only a bare legal title.[14] Some courts apparently reach this result by a confusion of the vendor's retention of title as security with the vendor's equitable lien after conveyance, leading to the conclusion that no beneficial interest remains in the vendor;[15] and it is this erroneous conception of the vendor's interest which apparently lies at the basis of all the adjudications which decline to recognize the lien of a judgment or the rights of an execution vendee on such interest. Under this doctrine, the only remedy of the judgment creditor is by garnishment or pro-

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[8]3 Freeman, Executions (3rd ed.) § 336; *cf.* Lessee of Paine *v.* Mooreland (1846) 15 Ohio, 435. As a judgment creditor is not himself a *bona fide* purchaser, J. I. Case Threshing Mach. Co. *v.* Walton Trust Co. (1913) 39 Okla. 348, 136 Pac. 769; Emery *v.* Farmers' State Bank (1916) 97 Kan. 231, 155 Pac. 34, it is held in many states that he is not when he buys at execution sale. 3 Freeman, Executions (3rd ed.) § 336; Lee *v.* Wrixon (1905) 37 Wash. 47, 79 Pac. 489.

[9]Moyer *v.* Hinman, *supra.*

[10]Hicks *v.* Riddick (1877) 69 Va. 418; 2 Freeman, Executions (3rd ed.) § 181.

[11]Lee *v.* Wrixon, *supra;* Good *v.* Williams (1909) 81 Kan. 388, 105 Pac. 433. Probably it would be more accurate to say that the vendor's interest is subject to sale on execution, but that no beneficial interest in the land passes. 1 Black, Judgments (2nd ed.) § 438.

[12]Jackson *v.* Snell (1870) 34 Ind. 241; Blackmer *v.* Phillips (1872) 67 N. C. 340. It has been said that, where the vendor indorsed the notes, his conditional right to resort to the land as an indorser, in case the maker did not pay, was too vague to be the subject of levy and sale. Leitch *v.* May (1896) 98 Ga. 714, 27 S. E. 151.

[13]Riverdale Mining Co. *v.* Wicks (1910) 14 Cal. App. 526, 112 Pac. 896; *cf.* J. I. Case Threshing Mach. Co. *v.* Walton Trust Co., *supra.*

[14]Moore *v.* Byers (1871) 65 N. C. 240; Chisholm *v.* Andrews (1880) 57 Miss. 636; 2 Freeman, Executions (3rd ed.) § 181.

[15]Jones *v.* Howard (1897) 142 Mo. 117, 43 S. W. 635; State Bank of Decatur *v.* Sanders (1914) 114 Ark. 440, 170 S. W. 86; see 3 Pomeroy, Eq. Jur. (3rd ed.) § 1260; 9 Columbia Law Rev. 261. Other theories are that the vendor is in a position similar to that of a mortgagee, and, as he holds the land as mere security for a debt, his interest is not vendible under execution, Chisholm *v.* Andrews, *supra;* Strauss *v.* White (1899) 66 Ark. 167, 51 S. W. 64, or that, since the vendor is bound to convey title, and a sale under execution would prevent him from so doing, his interest cannot be thus sold. Moore *v.* Byers, *supra.* But of course title could be conveyed by the execution purchaser.

ceedings in equity.[16] On the other hand, even in these states, the purchaser at sheriff's sale will ordinarily be protected if he buys without notice of the vendee's rights.[17]

PENALTY OR LIQUIDATED DAMAGES.—In deciding whether a sum stipulated to be paid on breach of a contract is liquidated damages or merely a penalty to secure performance of the contract, the intention of the parties is an important factor, but not always the controlling one.[1] It is the duty of the courts to enforce the contracts of competent parties as made, where they do not conflict with any rule of law or public policy; and contracts which fix damages are as lawful as any others, within certain limitations.[2] The law has adopted the principle of just compensation for the loss or injury actually sustained, and it will not permit the parties to set aside this fundamental rule.[3] Yet a court will disregard the agreement only where it is obvious that the principle of compensation has been disregarded,[4] and some courts say that intention must always govern.[5] This conflict is more apparent than real, however; the courts take such liberties in determining the intention of the parties[6] as to make it evident that the real question in this class of cases is, not what the parties intended, but whether the sum is, in fact, a penalty.[7] But if the subject matter of the contract is such that the parties might legally fix the damages, their intention one way or the other is decisive.[8] As the courts disregard such agreements in so many instances, it seems that they might better regard them in every case as merely *prima facie* evidence of the actual damages, varying in weight according as the damages were readily ascertainable or not.

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[16]See Baldwin *v.* Thompson (1864) 15 Iowa, 504; Taylor *v.* Lowenstein (1874) 50 Miss. 278; Tally *v.* Reid (1875) 72 N. C. 336.

[17]Rogers *v.* Hussey (1873) 36 Iowa, 664; see Taylor *v.* Lowenstein, *supra.* The position of the court in Jones *v.* Howard, *supra,* that though an execution purchaser acquires nothing, he would be protected if he bought without notice, seems self-contradictory.

[1]Wilkinson *v.* Colley (1894) 164 Pa. 35, 30 Atl. 286.

[2]Crisdee *v.* Bolton (1827) 3 C. & P. 240; Sun Printing & Pub. Ass'n. *v.* Moore (1902) 183 U. S. 642, 660 *et seq.,* 22 Sup. Ct. 240; Parker-Washington Co. *v.* City of Chicago (1915) 267 Ill. 136, 107 N. E. 872.

[3]Jacquith *v.* Hudson (1858) 5 Mich. 123; Gillilan *v.* Rollins (1894) 41 Neb. 540, 59 N. W. 893; Elzey *v.* City of Winterset (1915) 172 Iowa, 643, 154 N. W. 901.

[4]Jacquith *v.* Hudson, *supra;* Baltimore Bridge Co. *v.* United Rys. & El. Co. of Baltimore (1915) 125 Md. 208, 93 Atl. 420; Adler *v.* Kramer (1903) 39 Misc. 642, 80 N. Y. Supp. 624.

[5]Bilz *v.* Powell (1911) 50 Colo. 482, 117 Pac. 344.

[6]Seeman *v.* Biemann (1900) 108 Wis. 365, 84 N. W. 490; Wilhelm *v.* Eaves (1891) 21 Ore. 194, 27 Pac. 1053; City of York *v.* York Rys. (1910) 229 Pa. 236, 78 Atl. 128. The term the parties have given to the sum is not decisive; Scofield *v.* Tompkins (1880) 95 Ill. 190; Gay Mfg. Co. *v.* Camp (4 C. C. A. 1895) 65 Fed. 794; Caesar *v.* Rubinson (1903) 174 N. Y. 492, 67 N. E. 58; the court determines from the facts as a whole the view that equity and good conscience ought to take of the case. Streeper *v.* Williams (1865) 48 Pa. 450; Chicago House Wrecking Co. *v.* U. S. (7 C. C. A. 1901) 106 Fed. 385.

[7]Jacquith *v.* Hudson, *supra,* at p. 136; Gay Mfg. Co. *v.* Camp, *supra.*

[8]Jacquith *v.* Hudson, *supra.*